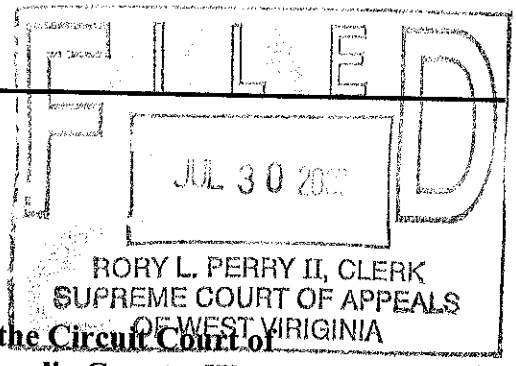
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 33335

CHARLESTON



ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Petitioners/Plaintiffs,

v.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC.,

Respondent/Defendant.

BRIEF OF *AMICUS CURIAE* OF THE WEST VIRGINIA MUTUAL INSURANCE COMPANY

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I. INTEREST OF THE *AMICUS CURIAE*

The West Virginia Mutual Insurance Company ("the Mutual") is a physician owned carrier providing medical professional liability coverage to its insureds, physicians, who practice in West Virginia. The Mutual was formed in 2004 as a result of legislation passed by the West Virginia legislature in an effort to solve the impact of a nationwide crisis in the affordability and availability of insurance for physicians, which was a particular problem in West Virginia. This Court recently described the Mutual in *Zaleski v. West Virginia Physician's Mutual Insurance Co.*, No. 33242, (S. Ct. W. Va. 2007), stating:

> [The] Mutual is a West Virginia corporation formed in 2004 in accord with statutory provisions enacted by the Legislature to address the "nationwide crisis in the field of medical liability insurance" causing "physicians in West Virginia [to] find it increasingly difficult, if not impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable." W.Va. Code § 33-20F-2 (a)(1) and (6) (2003) (Repl. Vol. 2006). The Legislature took temporary measures to alleviate the medical liability insurance problem by creating programs to provide coverage through the West Virginia Board of Risk and Insurance Management (hereinafter referred to as "BRIM") until the legislative "mechanism for the formation of a physicians' mutual insurance company" was actuated. W.Va. Code § 33-20F-2(b) (2003) (Repl. Vol. 2006). The statutory scheme provided that all medical liability insurance obligations and risks associated with BRIM policies be transferred to the new company upon its formation. W.Va. Code § 33-20F-9(b)(1) (2003); see 2003 W.Va. Acts c. 147.

According to the West Virginia Insurance Commissioner, the Mutual insured 48.5% of the physicians in West Virginia in 2006.[1] As the primary insurer for the majority of physicians

[1] See, State of West Virginia, Report on Insurers with Over 5% Market Share, West Virginia Insurance Commissioner, November 2006. The next largest insurer, Woodbrook/NCRIC, insures only 10.6%.

in West Virginia, who are also its owners, the Mutual has an interest in the application of the provisions of the Medical Professional Liability Act, as it directly affects its owner insureds.[2]

In this particular case, the plaintiffs (and their Amici) seek to broadly exempt from the MPLA the actions of infection control committees in the hospitals of this state - committees which necessarily involve the physicians of West Virginia on the medical staffs of our hospitals. A decision finding these activities outside the parameters of the MPLA is of profound concern to the Mutual, as it exposes physicians to increased risk (for which they likely do not have insurance coverage), and will discourage their participation. The brief of the Mutual will bring to this Court the unique and important perspective of its insured owner physicians.

RELIEF SOUGHT BY *AMICI CURIAE*

This Court should affirm the order of the Circuit Court applying W. Va. Code § 55-7B-8 because the hospital's infection control activity is a health care service as defined by the MPLA.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Like hospitals all over this country, West Virginia University Hospital ("WVUH") has a Department of Infection Control (DIC) whose mission is to monitor and prevent nosocomial, or hospital-acquired, infections. Indeed, infection control is a necessary function for the improvement of patient care, and is required by the Joint Commission of Accreditation of Health Care Providers (JCAHO). At WVUH, the record demonstrates the DIC was comprised of Rashida Khakoo, M.D., an epidemiologist and nurse practitioner Bonnie McTaggert, R.N. It appears there is no dispute between the parties that WVUH and the plaintiff had a health care

[2] Indeed, in *Zaleski*, this Court recognized "it is clear from the statutory purposes for promoting the creation of Mutual that physicians also have a substantial property interest in the availability of medical liability insurance since it directly effects a doctor's ability to pursue his profession in this state."

provider/patient relationship, that Dr. Khakoo and Ms. McTaggert were WVUH's agents, and that hospitals are obliged to address the prevention of nosocomial infection to protect patients. The dispute at trial was whether, in this case, WVUH, through its agents, acted reasonably or not in preventing the nosocomial infection sustained by the plaintiff.

It appears it was not until the jury returned a $10 million verdict that the appellant asserted that preventing infection was not health care, and the case was not governed by the provisions of the Medical Professional Liability Act, all in an attempt to avoid the application of the $1 million limitation on non-economic loss in W. Va. Code §55-7B-8 (1986).

The Mutual, on behalf of its physician owners and insureds, asserts here that the actions of the health care providers in working to prevent and monitor nosocomial infections at WVUH are health care within the meaning and spirit of the MPLA. Accordingly, the Court should apply the provisions of the MPLA, and affirm Judge Stone's ruling reducing the verdict in accordance with W. Va. Code § 55-7B-8 (1986).

III. ARGUMENT

A. Infection Control is health care furnished "for, to or on behalf" of patients within the parameters of the Medical Professional Liability Act.

The West Virginia Medical Professional Liability Act ("MPLA") governs actions within its definitions, s*ee State ex rel. Weirton Medical Center v. Mazzone*, 587 S.E.2d 122 (W. Va. 2002), and applies to "any medical professional liability action against a health care provider." W. Va. Code § 55-7B-8 (1986). The MPLA defines "Medical Professional Liability" as "*any liability* for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient." W. Va. Code § 55-7B-2(d) (1986). "Health

care" is defined as "any act or treatment performed or furnished, or which should have been performed or furnished, *by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment, or confinement.*" W. Va. Code § 55-7B-2(a) (1986) (emphasis added). A "health care provider" is defined as a "person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment." W. Va. Code § 55-7B-2(c).

In *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, the Court examined the statutory definition of "medical professional liability," stating,

> [T]he [MPLA]...applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous or related to the alleged act of medical professional liability.

609 S.E.2d 917, Syl. Pt. 3 (2004). In *dicta*, *Boggs* suggested examples of actions which do not fall under the MPLA, such as suits involving "fraud, spoliation of evidence, or negligent hiring." *Id.* at 923. Later, in *Gray v. Mena*, 625 S.E.2d 326, 331 (W. Va. 2005), the Court clarified *Boggs*, stating:

> This Court's opinion in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), is clarified by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (2003) (Supp. 2005), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care serves rendered or which should have been

rendered. To the extent that *Boggs* suggested otherwise, it is modified.

Gray v. Mena, 625 S.E.2d 326, 331 (W. Va. 2005)

Here, there is no dispute that WVUH, Dr. Khakoo and Ms. McTaggert were all health care providers. WVUH is a health care facility. W. Va. Code § 55-7B-2(c) (1986). Dr. Khakoo was a physician, and Ms. McTaggert a nurse, and both were acting within the scope of their employment (or agency) with WVUH in working for the Department of Infection Control. They are health care providers because both are licensed or certified in West Virginia and because § 55-7B-2 includes "employee[s] or agent[s]" of a hospital in the definition of "health care provider." W. Va. Code § 55-7B-2(c) (1986). (Indeed, if they were not, then WVUH would not have been liable for their actions.)[3]

Infection control is "health care" as defined by the MPLA. W. Va. Code § 55-7B-2(a) (1986). Contrary to the plaintiffs' argument "health care" by "health care providers" is not limited to "hands on" or direct patient care. The "for, to or on behalf of a patient" language of § 55-7B-2(a) refutes this argument in its elegant simplicity.

The import of the argument of the appellants and their amici is stunning. The absurd end result of their argument is that when Dr. Khakoo and Ms. McTaggert went to work each day at WVUH, analyzing patient records, and working with staff to prevent infection, they were not engaged in health care "for, to or on behalf" of the hospital's patients. Applying plaintiff's argument, their actions were no different than those of a janitor mopping the floor, or a handyman fixing a light. This position belies the multi-faceted health care functions performed

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[3] This Court has held that even though emergency medical service personnel were not included in the list of "health care providers" in W. Va. Code § 55-7B-2(c) (1986), this Court found they were, indeed, subject to the provisions of the MPLA. *Short v. Appalachian OH-9, Inc.*, 507 S.E.2d 124, 126 (W. Va. 1998). Conversely, this Court concluded that pharmacies are not "health care providers" within the MPLA definition of "health care provider." *Phillips v. Larry's Drive-In Pharmacy*, Slip Op. No. 33194, 2007 WL 1888445, Syl. Pt. 7 (W. Va. June 28, 2007).

every day by doctors and nurses in hospitals all over West Virginia and, indeed, across the country. Monitoring of nosocomial infection outbreaks is a vital aspect of patient care in a hospital setting.

In suggesting the MPLA applies only to "hands on" care, the plaintiffs' argument suggests a "zone" of care not present in the MPLA's definitions. If the work of Dr. Khakoo and Nurse McTaggert was not health care, what else might not be "health care?" How about a physician who discusses an issue with another physician, but does not see the patient? Or reads an x ray? Interprets pathology? Fails to wash hands after lunch? Because the control and prevention of nosocomial infection is performed by health care providers solely for the benefit ("for, to or on their behalf") of patients, it falls squarely within the definition of "health care."

"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *West Virginia Univ. Bd. of Governors v. the West Higher Educ. Policy Comm'n*, Slip Op. No. 33208 (W.Va. May 24, 2007); *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Here, the definition of health care is not ambiguous, and the "for, to or on behalf of" language plainly demonstrates a recognition that not all health care providers put their "hands on" patients.

This case is distinguishable from *Boggs*. Even its *dicta* (scaled back in *Gray v. Mena*), about "fraud, spoliation of evidence, or negligent hiring" can hardly be compared to the role of infection control practices in a hospital, which is most certainly not "outside the scope of health care services." *Boggs*, 609 S.E.2d at 924. In *Gray v. Mena*, the Court confirmed that "medical

professional liability," as defined in the MPLA, "includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered." *Id.* *Gray* recognizes quite explicitly that the MPLA broadly applies to all torts.

Phillips is also distinguishable, as the Court simply held a pharmacy is not a "health care provider" within the statute. *Phillips*, 2007 WL 1888445, syl. pt. 7. The issue of "hands on" care, to which the plaintiffs cling, was discussed only in the context of whether § 55-7B-2(c) could be read to include pharmacies which were not expressly included in the list of examples of health care providers. Previously, in *Short v. Appalachian OH-9,* the Court examined legislative intent to conclude that emergency medical technicians did the same types of things as doctors, nurses and others mentioned in § 55-7B-2(c), and found they did. 507 S.E.2d 124, 128 (W. Va. 1998). Conversely, the *Phillips* Court ruled that pharmacies did not fit the definition because the things they did were not similar to others in 2(c).[4] The discussion of "hands on" care in *Short* and *Phillips,* therefore, related to whether EMTs or pharmacies, not expressly mentioned in W. Va. Code § 55-7B-2(c) were captured by its "included but not limited to" language. Here, where there is no issue as to whether WVUH, Dr. Khakoo and Nurse McTaggert were health care providers, the "hands on" type analysis is unnecessary and simply does not apply. Thus, contrary to appellants' assertion, there is no rule from *Phillips* that hands-on patient care is necessary for services to fall under the MPLA definition of "health care."

B. Constitutionality and Wisdom

The brief of the appellant's amici, West Virginia Associates for Justice ("WVAJ"), spends an inordinate amount of time attacking the wisdom of the legislature in enacting the

[4] In *Phillips*, the Court stated "[w]e conclude that because certain medical professionals are specifically included under the MPLA, but pharmacies are not included, means that the Legislature intended to exclude pharmacies."

MPLA, suggesting the entire statute is constitutionally suspect, and arguing the unfairness of limitations on damages. How this relates to the statutory argument here is unclear, but it is clear that this assertion is incorrect. The constitutionality of the MPLA as a whole, or of the million dollar cap, is not an issue before this court, and this Court, on two occasions, has affirmed that the million dollar cap is constitutional. *See Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877 (W. Va. 1992).

The WVAJ also engages in a rhetorical attack upon the medical community and its lawyers, suggesting some kind of plot to expand the MPLA to provide "immunity" or "amnesty" and some sort of "tyranny." The record here contains no evidence of a plot, and it does not appear that the parties have addressed or been concerned about any such plot.[5] Indeed, the plaintiffs here specifically do not attack the constitutionality of the MPLA or the million dollar cap, but rather limit the argument to whether the MPLA applies to the particular circumstances of this case.

To cast the MPLA as providing "amnesty" or "immunity" is simply incorrect. Those terms suggest the MPLA somehow eliminates liability for health care providers, which it most certainly does not. In terms of damages, the only limitation impacting in this case, the MPLA reflects the judgment of the legislature that $1 million was a fair limitation on non-economic loss (with no limitation on recovery for economic loss), a constitutional exercise of its power.[6] The WVAJ arguments, then, are best addressed to the legislature, and not to this court.

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[5] The WVAJ suggests there is something wrong with WVUH asserting the protection of the MPLA, and asking the Courts to determine its applicability. Its brief states this case represents the latest attempt to "overreach" by defendants. This is a case about statutory interpretation. WVUH is no less entitled to a determination of the meaning of the MPLA than are the plaintiffs. Indeed, one could assert this is the latest attack on the MPLA by the trial lawyers who were unsuccessful in the legislature. These arguments, while passionate, don't advance the ball, have nothing to do with the issue here, and should be ignored.

[6] Indeed, the hospital in *Robinson v. Charleston Area Medical Center, Inc,* 414 S.E.2d 877 (W. Va. 1992). might reasonably question whether it had "immunity" or "amnesty" when it was ordered to pay the plaintiffs $11.75 million dollars after application of the million dollar "cap."

IV. CONCLUSION

The West Virginia Mutual Insurance Company urges this Court to affirm the order of the Circuit Court finding the MPLA applicable to the instant case, as WVUH's infection control activity is a "health care" service, and the appellant's suit is a "medical professional liability" action. Because this action is governed by the MPLA, its provisions, including the $1 million cap on non-economic damages, apply to the appellant's claims against WVUH. The Circuit Court's order of October 26, 2006, reducing the verdict as required by W. Va. Code § 55-7B-8, should be affirmed.

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CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., do hereby certify that I have served the foregoing "**Brief of *Amicus Curiae* of the West Virginia Mutual Insurance Company**" upon the following counsel of record by depositing a true and accurate copy thereof in the United States Mail, postage prepaid, this 27th day of July, 2007, addressed as follows:

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